MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD SMITH, JR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TYRONE C. FAHNER,
Attorney General,
State of Illinois,
MELBOURNE A. NOEL, JR.,
THOMAS E. HOLUM,
WILLIAM M. WIPPOLD,
Assistant Attorneys General,
188 W. Randolph St.,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,
Attorneys for Respondent.

Printed by the Authority of the State of Illinois—5-81-50—P.O. 52439

QUESTION PRESENTED FOR REVIEW

Whether it was an error of constitutional dimension to deny petitioner the opportunity to cross-examine a complaining witness about a pending criminal charge for which he has not been convicted?

INDEX

		PAGE
QUESTION PRESENTED FOR REVIEW		i
I.	STATEMENT OF THE CASE	2
II.	REASON FOR DENYING THE WRIT	3
	THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A CRIMINAL DEFENDANT BE ALLOWED TO IMPEACH A WITNESS THROUGH A PENDING CHARGE FOR WHICH HE HAS NOT BEEN CONVICTED	
III.	CONCLUSION	7

CASES CITED

	PAGE
Chapman v. *California,* 386 U. S. 18 (1967)	5
People v. *Baptiste,* 347 N. E. 2d 92 (Ill. App. 1976)	5
People v. *Mason,* 192 N. E. 2d 835 (Ill. 1963)	5
Tafoya v. *United States,* 386 F. 2d 537 (10th Cir. 1967), *cert. denied,* 390 U. S. 1034 (1968)	5-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD SMITH, JR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS*

The respondent, People of the State of Illinois, respectfully requests that the Petition for Writ of Certiorari to review the order of the Supreme Court of Illinois denying petitioner leave to appeal, be denied.

* The record is actually lodged in the Appellate Court of Illinois, Fourth District.

I.

STATEMENT OF THE CASE

The relevant facts as summarized by the Appellate Court of Illinois, *People* v. *Smith*, 408 N. E. 2d 743, 746-747 (Ill. App. 1980), are as follows:

> At about 8:15 p.m. on August 10, 1978, defendant was on duty as a police officer and using a city squad car. He observed Tobias operating a motorcycle with Ferguson as a passenger. While the police had received the report of a motorcycle stolen in Springfield and information that Tobias had been seen on such a vehicle, defendant testified that he attempted to stop them because the riders had no eye-protection and the cycle had no taillight. He first attempted to stop them by honking his horn, but as the riders appeared to speed away, he turned on the flashing lights of the squad car and pursued.
>
> Weathington, a deputy sheriff, and Dodson, a state trooper, observed this opening action and followed, but apparently used differing routes because of highway conditions. The only persons observing the critical events were the defendant, Tobias and Ferguson. The cycle and defendant's squad car proceeded north at speed to Evers Road to its intersection with Johnson Road. The latter highway ran east and west and the intersection with Evers Road was a 'T'. Evers Road formed the vertical portion of the 'T'. The cycle crossed the intersection and proceeded north into a bean field for a distance of some 30 feet where it and the riders fell. Defendant stopped his car in the intersection and when he observed Tobias and Ferguson get up and lift the cycle he identified himself as a police officer and fired a warning shot. As the men attempted to mount the cycle defendant fired two or more shots from his shotgun.
>
> Tobias and Ferguson testified that they were attempting to mount the cycle and to get away while defendant testified that he fired the two shots toward them since the men mounted the cycle and drove towards him. The defendant's theory of self-defense was that he had reason to believe that the men were charging towards him with the motorcycle and that he needed to protect himself.

* * *

> Circumstantial evidence relevant to the issue of self-defense discloses that the wounds suffered by Tobias and Ferguson were received upon the back of their respective limbs and bodies. The record also contains testimony showing a single track of the cycle into the bean field from the 'T' intersection, an area where the beans were flattened from the fall of the cycle and the men, and a single meandering track of the cycle from the flattened area of the bean field to the northwest where Ferguson and the cycle were found. No track of the cycle through the bean field from the place of the fall toward the defendant at the intersection could be found.

Defense counsel had attempted to cross-examine one of the victims, Ferguson, concerning pending charges against him of aggravated battery arising from an altercation with a state trooper. Counsel argued that such examination was proper and admissible upon the theory that it was relevant to a showing of bias of Ferguson as a witness arising in a hope or promise of leniency. The trial court sustained the State's objections to the proposed cross-examination.

The Appellate Court agreed that it was error to exclude such cross-examination of Ferguson but held that the error was harmless beyond a reasonable doubt. This is the sole issue raised in the present petition.

II.

REASON FOR DENYING THE WRIT

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A CRIMINAL DEFENDANT BE ALLOWED TO IMPEACH A WITNESS THROUGH A PENDING CHARGE FOR WHICH HE HAS NOT BEEN CONVICTED.

Since the error alleged in the petition has already been acknowledged by the Appellate Court of Illinois, this case has no precedental value. Review of this case by this Court will not

affect the rights of criminal defendants in the courts of Illinois in the future. As to the affect on this particular defendant, the evidence of his guilt was overwhelming and the verdict of the jury was not determined by the weight of the testimony of the victim sought to be impeached.

The petitioner argues that evidence he sought to admit was critical.

> The petitioner testified under oath that he shot in the direction of the motorcycle only because the motorcycle was charging towards him. Where the petitioner claimed he was shooting in self defense, it was critical for him to be able to cross-examine each of the State's witnesses to show whatever bias or prejudice that witness may have. The petitioner must be able to inform the jury of that potential bias or prejudice and then let the jury determine that witness' credibility based upon the jury's knowledge of those factors which could conceivably affect the witness' testimony.

(Pet. p. 8)

In the first place, the witness petitioner sought to impeach was a victim, a complainant. The evidence showed that all the wounds suffered by him and Tobias were on the back of their respective limbs and bodies. It is unlikely that a jury could be persuaded that the prosecution had to promise Ferguson leniency in a pending case in order to get him to testify against the officer who shot him. Even if a jury could be thus persuaded it still does not explain away the wounds in the back which clearly contradicted petitioner's self-defense theory.

Secondly, Ferguson's testimony was corroborated by Tobias, against whose testimony petitioner has no complaint of error.

Thirdly, when Ferguson and Tobias took the stand each admitted he had a prior felony conviction. So petitioner had ample ammunition with which to attack their credibility.

Fourthly, in addition to the wounds on the back of the victims' bodies, the only track of their motorcycle was found to be moving in a direction away from the petitioner. Therefore, even if Ferguson had not testified, or if his credibility had been further impeached, the jury had before it ample evidence supporting the victims' version of events and refuting petitioner's.

Assuming that the error raised here and acknowledged by the Illinois court was of constitutional magnitude, reversal of petitioner's conviction is not mandated. Constitutional error committed in the course of securing a criminal conviction will not occasion reversal of the conviction if it was harmless. *Chapman* v. *California,* 386 U. S. 18 (1967).

In fact, the error complained of was *not* constitutional proportions but merely an Illinois evidentiary rule. The Appellate Court of Illinois' finding of error was predicated upon two Illinois cases, *People* v. *Mason,* 192 N. E. 2d 835 (Ill. 1963), and *People* v. *Baptiste,* 347 N. E. 2d 92 (Ill. App. 1976). In *Mason* the Supreme Court of Illinois, even while holding that the defendant should have been allowed to cross-examine a state's witness as to whether he had been arrested and indicted, noted:

> The rule prevailing in most jurisdictions and supported by the great weight of authority is that it is not permissible to show that a witness has been arrested, charged with a criminal offense, or confined in prison, or to inquire as to such fact upon cross-examination, where no conviction is shown, for the purpose of impairing his credibility. Anno. 20 A. L. R. 2d 1421, 1425.

Mason at 837.

Thus the Illinois rule is more liberal than the Constitution requires and broader than that of most jurisdictions. *See Tafoya* v. *United States,* 386 F. 2d 537, 539 (10th Cir. 1967), *cert. denied,* 390 U. S. 1034 (1968): "It is clear that only

previous convictions, and not previous acts of misconduct, which do not result in conviction, may be used to impeach a witnesses' credibility."

The sole error complained of was harmless beyond a reasonable doubt and was not of constitutional dimension.

III.

CONCLUSION

For the foregoing reasons the respondent, People of the State of Illinois, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General,
State of Illinois,
MELBOURNE A. NOEL, JR.,
THOMAS E. HOLUM,
WILLIAM M. WIPPOLD,
Assistant Attorneys General,
188 W. Randolph St.,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,
Attorneys for Respondent.